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IN THE

# Supreme Court of the United States

October Term, 1936.

## No. 247

EDWARD T. BLAIR, *Petitioner,*

v.

GUY T. HELVERING, Commissioner of Internal Revenue.

**On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.**

## BRIEF AMICUS CURIAE.

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**BRIEF AMICUS CURIAE.**

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Comes now the undersigned, a member of the Bar of this Court, and moves for leave to file instanter the annexed brief as *amicus curiae*.

The requisite consents have been filed with the Clerk.

JOHN E. HUGHES,
First National Bank Building,
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*Amicus Curiae.*

*May It Please The Court:*

In this brief we pass the question of *res adjudicata* because it is an affirmative defense such as is required by Rule 14 of the Board of Tax Appeals to be pleaded. *(Reserve Natural Gas Co., 15 B. T. A. 951, 953.)* The Commissioner could have amended his answer before the Board of Tax Appeals and set it up but he did not do so. Consequently the Board did not consider it and the Circuit Court of Appeals could not have held that the Board committed error by failure to consider of its own motion a defense not raised before it. *Helvering v. Salvage, 297 U. S. 106,* at p. *109.*

In this brief the arguments in the *amicus curiae* brief filed on the petition for the writ are not repeated but the Court is referred to that.

## THE DECISION OF THE ILLINOIS APPELLATE COURT DETERMINES TO WHOM THE INCOME BELONGS AND HENCE CANNOT BE DISREGARDED BY THE FEDERAL COURTS IN A TAX CASE.

In *Hoeper v. Tax Commission of Wisconsin, 284 U. S. 206,* this Court held that a statute which taxed a husband on the income of his wife was unconstitutional. It follows that if the statute in the case at bar taxes the petitioner on the income of his children it is unconstitutional. So long as State Court decisions, which are binding on all the parties concerned, determine between them who is the owner of income, those decisions cannot be disregarded by the Federal Courts in tax cases. When a State Court renders a conclusive adjudication between A and B, holding

that certain income is the income of B, it is thereby settled that the income is B's income and not A's income, regardless of what may be held by a Federal Court in a tax case. Inasmuch as one person cannot be taxed on the income of another it follows that the Federal Courts cannot disregard a State Court decision which conclusively adjudicates the question to whom income belongs. When the State Court decision has become final it must be followed, right or wrong. Otherwise A will be taxed on the income of B. Besides in many cases not only will all A's income be confiscated but he will be liable for more than he has.

Suppose the income of a trust in the hands of a trustee is $1,000,000. Since these assignments have been made tax rates have progressively increased until at 1936 rates the tax on $1,000,000 is $681,000. If one was entitled to all the income from a trust but years previously by a valid assignment has given away one-half of his interest, he is not entitled to receive more than $500,000 and if that is all the income he has, it is impossible for him to pay the $681,000 tax. An absurd result should be avoided for, as this Court has said, "taxation is eminently practical". If taking all a taxpayer has is confiscation, certainly a construction which may take more than he has is worse.

## THE PETITIONER IS NOT A BENEFICIARY WITHIN THE MEANING OF THE STATUTE.

Where statutory construction becomes necessary the established rule is that the statute must be strictly construed against the Government and liberally in favor of the taxpayer and that all doubts must be resolved in favor of the taxpayer. *(Crooks v. Harrelson, 282 U. S. 55, 61.)*

The statute quoted on page 44 of the respondent's brief provides for the taxation of all the income to the fiduciary but allows as a deduction the income:

> "which is to be distributed currently by the fiduciary to the beneficiaries * * * but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries, whether distributed to them or not."

To whom is the fiduciary to distribute the income in dispute? The fiduciary asked the Courts of Illinois to answer that question and they decided that the fiduciary was to distribute it to the children of petitioner and not to petitioner. Those having the benefit of the income are the beneficiaries.

By the assignments petitioner abdicated as a beneficiary of the interest assigned. Having abdicated he was no longer a beneficiary but the children were substituted as beneficiaries. It is as logical to say that the petitioner was a beneficiary as it is to say that the man for whom a batter in a baseball game is substituted is really the batter instead of his substitute.

On page 40 of his brief respondent says:

> "There is nothing in the other cases cited by petitioner which may be construed as permitting the taxation of trust income to anyone other than the beneficiary receiving it."

In this case we contend that the beneficiaries receiving the trust income who have paid the tax, are the ones who are taxable within the meaning of the statute. The contention is that petitioner could not have received it at any time during the taxable year.

The partnership case of *Burnet v. Leininger, 285 U. S. 136,* cited by respondent, is distinguishable because there

the assignment did not substitute the assignee as a member of the partnership and could not legally do so. In the case at bar the Appellate Court of Illinois has decided that the assignment substituted the children as beneficiaries and could legally do so. It ordered the trustees to pay the money to the children and not to petitioner.

The situation of the Government being bound by cases in State Courts to which it is not a party is no different than the situation of thousands of taxpayers who are bound by decisions in litigation between the Commissioner and a private party, such as the litigation in the case at bar, to which litigation they are not parties and in which they have no opportunity to be heard. It is the old continental argument against the precedent system of English law.

The Government has also suggested that its right to collect revenue should not be governed by private agreements but the gift tax law recognizes the right to make a gift and the right to make a gift or create a trust whereby the tax liability of the donor is affected has always been recognized.* Petitioner merely exercised his undoubted

* At pages 51 to 53 of its brief in the **Tex-Penn Oil case** the Government argues that if stock cannot be sold and thus has no market value because it is received by a taxpayer subject to a legally binding agreement preventing its sale, the agreement should be disregarded. This argument is made in the face of the fact that it can be determined to have a market value only by disregarding the agreement and that the statute does not tax it unless it has a market value. When the same argument was made with respect to a stock restriction in the case of **Attorney General of Ireland v. Jameson (1904), 2 Ir. R. K. B. 644**, the Judges in delivering their opinions at pages **674, 680** and **681**, answered it by saying it was a complaint which might be appropriately addressed to Parliament but not to the Court. (See also the decision of the Court of Appeal of England in **In Re Paulin, 104 L. J. R. 124 (1935)**). The case of **Helvering v. Salvage, 297 U. S. 106**, holding at page **109** that stock subject to an option restriction could not be valued for income tax purposes in excess of the restricted price, regardless of the price at which unrestricted shares of the same stock were selling, is utterly inconsistent with this argument of the Government.

right to make a gift of his interest in the trust. Certainly he cannot be taxed during a taxable year on what he gave away prior to the taxable year.

## CONCLUSION.

In the case at bar the Appellate Court decided that petitioner had validly assigned the income before he received it. Under that decision he can never receive it and was not entitled to receive it in the same way that if Your Honor has an annuity and gives it away today you are not entitled to receive it in future years. In such case it is not your income and it was not petitioner's income, and under the Sixteenth and Fifth Amendments it is submitted no one can be taxed on any income except his own. The cases upon which the Government relies recognize this but in those cases the income was held to first accrue to the taxpayer during the taxable year and before it passed to his assignees. Here the Appellate Court of Illinois stated the question was whether petitioner could assign the income "before he received it" and decided that he could. The opinion of the Appellate Court is as much a part of its mandate as if it were set out *verbatim* therein. *Metropolitan Company v. Kaw Valley District, 223 U. S.* at p. *523.*

All of which is respectfully submitted.

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